for the insurers and directed that summary judgment be granted for the Commissioner on all the insurers' claims for relief. As such, the Ninth Circuit ruled that the insurers were not "prevailing parties" for purposes of Section 1988, and accordingly held that the insurers were not entitled to fees. *Gerling II*, 296 F.3d at 851.

The insurers, supported by the federal government as *amicus*, petitioned this Court for a writ of certiorari, contending that the HVIRA was unconstitutional because it (i) interfered with the federal government's exercise of its power over foreign affairs, (ii) violated due process, and (iii) violated the Commerce Clause. The insurers did not petition this Court for review of the Ninth Circuit's disposition of their other constitutional claims or the attorneys' fees issue.

This Court granted certiorari on all three questions presented, but issued a decision on June 23, 2003, holding only that the HVIRA was preempted because it conflicted with the federal government's foreign policy initiatives directed to Holocaust-related insurance claims. *Garamendi*, 539 U.S. at 401.[2] Because this Court disposed of the case on foreign affairs preemption grounds, this Court expressly did not address the due process and Commerce Clause claims. *Id.* at 413 n.7.

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[2] Even so, this Court's majority acknowledged that there were "powerful arguments" made as to why the HVIRA's approach would work better than the Executive Branch's approach, and that the HVIRA's approach might be "the preferable policy" were it not for consideration of other issues involving this country's relations with its European allies. *Garamendi*, 539 U.S. at 427. Four Justices dissented and voted to affirm the Ninth Circuit's judgment and uphold the HVIRA. *Id.* at 430-443.

Following the insurers' success on their foreign affairs preemption claim in this Court, they again moved for attorneys' fees pursuant to Section 1988. The Ninth Circuit transferred the question of fees to the district court, which again ruled that the insurers were not entitled to fees. App., *infra*, 20-26. The district court correctly found that the preemption of the HVIRA by the federal government's exercise of its foreign affairs power did not implicate a right, privilege or immunity recognized by Section 1983 so as to support a Section 1988 fee award. App., *infra*, 24-26. The district court also correctly found that even though the Commerce Clause and Due Process Clause might be bases for a Section 1983 claim, the insurers had not prevailed on either of those claims because the Ninth Circuit had already held that the HVIRA did not violate those constitutional provisions. App., *infra*, 26. The district court recognized that this Court expressly had not considered or decided the Commerce Clause or due process issues. App., *infra*, 24.

The insurers appealed the district court's denial of their fees to the Ninth Circuit, which reversed. *Gerling Global Reinsurance Corp. of Am. v. Garamendi*, 400 F.3d 803 (9th Cir. 2005), rehearing denied, as amended, 410 F.3d 531 (9th Cir. 2005) ("*Gerling III*"). App., *infra*, 1-19. The Ninth Circuit held that although the insurers had not prevailed on their due process and Commerce Clause claims, they were nevertheless entitled to an award of fees under Section 1988.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's unprecedented extension of *Maher* permits a plaintiff who litigates and loses his Section 1983 claim on the merits to nevertheless recover fees under Section 1988. *Maher*, however, held only that a plaintiff whose Section 1983 claim was never ruled upon for prudential reasons could under certain circumstances be assumed to have prevailed on that claim. The Ninth Circuit's new rule expanding the availability of attorneys' fees is an unwarranted departure from the settled boundaries of *Maher*, is not supported by the language or legislative history of Section 1988, conflicts in principle with the decisions of this Court and others, and will have distorting effects on Section 1983 litigation. The decision also impermissibly intrudes on this Court's certiorari process by attributing legal significance to this Court's decision to grant certiorari on the insurers' Section 1983 claims and its subsequent decision not to address those claims.

1. Contrary to the Ninth Circuit's decision, the essential predicate for an attorneys' fee award pursuant to Section 1988 is prevailing on a Section 1983 claim, and not simply victory in the case. See *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 592 (1995); cf. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001); *NOW v. Operation Rescue*, 37 F.3d 646, 653-654 (D.C. Cir. 1994). *Maher* created a limited "prevailing party" assumption for purposes of awarding Section 1988 fees. Relying on the legislative history of Section 1988, this Court held in *Maher* that a fee award may be permitted in certain circumstances, as a matter of fairness, where a plaintiff has been precluded from obtaining any ruling on his Section 1983 claim.

To qualify for fees under *Maher*, a plaintiff must prevail on a non-fee bearing claim that is factually related to a "substantial" Section 1983 claim that was never decided for prudential reasons. In those limited circumstances, *Maher* permits courts to assume that the plaintiff would have prevailed on the Section 1983 claim had the plaintiff been allowed to litigate that claim to adjudication.

That assumption, however, is not warranted where the plaintiff has actually litigated, and lost, his Section 1983 claim. Under such circumstances, there is no basis to support the different assumption that the lower court was wrong and that the plaintiff would have prevailed in a higher court on his failed Section 1983 claim had that court addressed it.

Here, the insurers litigated and lost all of their Section 1983 claims in the Ninth Circuit. They ultimately prevailed in this litigation because this Court ruled in their favor only on the claim that California was intruding on the Executive Branch's conduct of foreign affairs – a non-fee bearing claim.[3] *Maher* does not apply to these circumstances, and there is no public policy reason for assuming that a plaintiff has prevailed on a Section 1983 claim where a court has already held that the plaintiff has not vindicated any Section 1983 right and has instead determined that no such right exists.

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[3] Judge Graber's concurring opinion in *Gerling III* expressly recognized that such foreign affairs preemption does not create individual Section 1983 rights (App., *infra*, 18), and the Ninth Circuit panel majority in that decision assumed, but did not decide, the same thing. App., *infra*, 9 and 17.

Nevertheless, purporting to rely on *Maher*, the Ninth Circuit has established a new rule for fee awards that ignores and makes irrelevant the fact that a plaintiff litigated and lost his Section 1983 claim. So long as the plaintiff prevails on a non-fee bearing claim and the failed Section 1983 claim is "substantial" (*i.e.*, not frivolous) and "unaddressed" by a reviewing court, the plaintiff will be assumed to have prevailed on his failed Section 1983 claim and be entitled to fees under Section 1988. App., *infra*, 12. There is no authority for this expansion of *Maher*; to the contrary, another court has concluded that *Maher* does not warrant a fee award where the plaintiff has lost his Section 1983 claim in the lower court, and the appellate court declines to reach the claim. *Amer. Auto. Mfrs. Ass'n v. Cahill*, 53 F. Supp. 2d 174, 179-181 (N.D.N.Y. 1999).

In effect, the Ninth Circuit's new rule creates an assumption for fee purposes that the lower court that decided the Section 1983 claim was in error and should be reversed. *Maher*, however, did not establish a test for implicitly reversing lower court decisions. Indeed, the Ninth Circuit's unfounded implicit reversal rule cannot be reconciled with its own recognition that its decisions on the insurers' due process and Commerce Clause claims continue to have precedential value.[4]

The Ninth Circuit's new rule will create significant mischief in many other cases. By emasculating the "prevailing party" standard for the award of fees, the Ninth Circuit's decision will invite and encourage plaintiffs to

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[4] The concurring opinion expressly acknowledged that the Ninth Circuit's Commerce Clause and due process decisions continue to have precedential effect (App., *infra*, 19 n.1), and the majority opinion implied as much. App., *infra*, 15.

attach meritless Section 1983 claims to routine non-fee bearing claims (*e.g.*, tort claims), hoping that such claims can meet the minimal substantiality test (*i.e.*, non-frivolousness) necessary for a fee award even if the plaintiff loses those claims.[6] If an appellate court declines to address those failed claims, but the plaintiff prevails on his state law claim, fees will be awarded pursuant to *Gerling III*.

The Ninth Circuit's rule will also have a chilling effect on a defendant's decision whether to appeal in cases raising state law and Section 1983 claims. Where a defendant has lost on the state law claim but defeated the Section 1983 claim in the lower court, the defendant may be reluctant to appeal the adverse state law decision for fear that the plaintiff will cross-appeal on the Section 1983 claim, the appellate court will reach only the state law claim, but fees will nevertheless be awarded based on the Section 1983 claim that the plaintiff lost and the appellate court never reached.

Neither the language of Section 1988, the legislative history of that section, the decisions of this Court or others, nor the public policy underlying the award of fees to Section 1983 claimants supports the Ninth Circuit's decision. The insurers had their day in court and were not unfairly deprived of the opportunity to vindicate their Section 1983 rights. Congress neither said nor intended that a plaintiff is entitled to a second (or third) determination on the merits of his Section 1983 claim for purposes of a fee

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[6] The "absence of frivolousness" is "scant protection" for those who are innocent of any civil rights violations. *Buckhannon*, 532 U.S. at 620 n.4 (Scalia, J., concurring).

award. The Ninth Circuit misconstrued *Maher*, and certiorari should be granted to clarify the boundaries of a Section 1988 fee award. Cf. *Elder v. Holloway*, 510 U.S. 510, 515 and n.3 (1994) (granting certiorari and reversing the circuit court's announcement of a new rule of qualified immunity that misconstrued this Court's precedent and that "could have a number of untoward effects").

2. The Ninth Circuit's decision also impermissibly intrudes on this Court's discretionary review process by according fee significance to this Court's grant of certiorari. Under *Gerling III*, this Court's grant of certiorari on a Section 1983 claim that the petitioner lost in the court of appeals in effect reverses that adverse ruling for purposes of a fee award. According to the Ninth Circuit, so long as this Court rules in favor of the petitioner on a non-fee bearing claim and leaves the petitioner's failed Section 1983 claim "unaddressed," the plaintiff is assumed to have prevailed in this Court on that Section 1983 claim for purposes of awarding fees under *Maher*. App., *infra*, 15 and 17.

That result misapprehends and interferes with this Court's limited and discretionary review through certiorari. That discretionary review means, among other things, that this Court is not bound to decide issues that it agrees to hear. The Ninth Circuit's decision, however, burdens this Court's discretion by attaching fee significance to the decision to grant certiorari. In this case, millions of dollars in fees could be awarded to the insurers, who as a matter of law did not vindicate any Section 1983 rights, simply because this Court granted certiorari on their failed due process and Commerce Clause claims and then took no further action with respect to those claims. That result is contrary to well-settled precedent that

affords no weight or legal significance to the grant of certiorari.

Moreover, this Court's exercise of its discretionary review power, by granting certiorari on a Section 1983 claim and then not deciding it, does not implicate *Maher* because it does not unfairly deprive a petitioner of an opportunity to be heard on that claim. Certiorari jurisdiction is used to secure uniformity of decisions or to resolve important questions of public interest. It is not available simply to give a litigant another hearing on the merits. Thus, the policy reasons underlying *Maher* do not apply to this Court's certiorari jurisdiction.

If *Maher* applies, then this Court would (or should) now take into account the potential fee implications of any decision to grant certiorari and any subsequent decision not to address an issue for which it has granted certiorari. There is no authority for the Ninth Circuit's expansion of *Maher* to these circumstances or its attendant intrusion into this Court's discretionary review process.

3. The HVIRA was preempted because it conflicted with the federal government's expression of foreign policy on Holocaust-related claims. That expression of foreign policy did not create individual rights in the insurers that are enforceable under Section 1983. The fact that the insurers incidentally benefited from that foreign policy or had an interest in it is insufficient to create Section 1983 rights. Accordingly, preemption of the HVIRA on foreign affairs grounds does not provide any basis for an award of attorneys' fees pursuant to Section 1988.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION ERRONEOUSLY EXTENDED *MAHER* TO THIS CASE IN WHICH THE SECTION 1983 CLAIMS WERE DECIDED ADVERSELY TO THE INSURERS

Section 1988 permits a court, in its discretion, to award reasonable attorneys' fees to a party who prevails on his Section 1983 claim (*i.e.*, who prevails on his claim under Section 1983 that he was deprived of a right, privilege or immunity secured by the Constitution or laws of the United States). Prevailing on the "federal civil rights" claim is an "essential predicate" for an award of Section 1988 fees. *Operation Rescue*, 37 F.3d at 653. When a plaintiff is not entitled to relief under Section 1983, "[i]t follows that . . . no attorney's fees can be awarded under § 1988." *Truck Council*, 515 U.S. at 592. The Ninth Circuit ignored this essential predicate in deciding *Gerling III*.[6]

There are occasions where it may be appropriate to infer that a plaintiff who never obtains a decision on his Section 1983 claim nevertheless should be considered the "prevailing party" on that claim. For example, a plaintiff asserting a Section 1983 claim may favorably resolve that

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[6] The Ninth Circuit's assertion that its decision is "entirely consistent" with the *Truck Council* holding (App., *infra*, 13 n.1) is puzzling. This Court held in *Truck Council* that Section 1988 fees are not permitted where the plaintiff obtains relief under state law but is not entitled to Section 1983 relief. 515 U.S. at 592. The Ninth Circuit, on the other hand, has held in *Gerling III* that a plaintiff may recover fees even though all of his Section 1983 claims have been adjudicated against him and, as such, he is not entitled to Section 1983 relief. The Ninth Circuit's decision simply cannot be squared with this Court's holding in *Truck Council*, and the holdings in numerous other cases, that a plaintiff must prevail on a Section 1983 claim in order to receive Section 1988 fees.

claim through a consent decree without ever litigating that claim. Under those circumstances, Congress apparently intended to assume that the plaintiff was a "prevailing party" on his Section 1983 claim. *Maher*, 448 U.S. at 129, 132.

Similarly, where a plaintiff joins a fee-bearing Section 1983 claim with a non-fee bearing statutory claim, the courts for prudential reasons are directed to resolve the case solely on the non-constitutional ground if possible. *Maher*, 448 U.S. at 132 and n.15. If the plaintiff wins his non-fee bearing claim, but is precluded from having a substantial, factually-related Section 1983 claim decided, Congress also thought that fees under Section 1988 might be awarded. *Id.* Under those circumstances, a court is permitted "to assume that the plaintiff has prevailed on his fee-generating claim." *Smith v. Robinson*, 468 U.S. 992, 1007 (1984).

That assumption, however, is not justified where the plaintiff has lost on his Section 1983 claim in the last court to rule on that claim. Such an assumption is inconsistent with the language of Section 1988 and the policy reasons that motivated Congress and this Court to allow fees for certain undecided Section 1983 claims. Indeed, applying the assumption where the plaintiff in fact litigated and lost his Section 1983 claim in the lower court effectively creates a new assumption for fee purposes that the lower court's Section 1983 decision was in error and should be reversed. Neither *Maher* nor the language or legislative history of Section 1988 supports such a radical assumption.

To the contrary, numerous courts have acknowledged that a plaintiff who loses on even a "substantial" Section 1983 claim that is factually related to a successful non-fee

bearing claim is not entitled to fees. Many of these courts have recognized that *Maher* was intended to address the very different situation where a plaintiff has not been able to obtain adjudication of his Section 1983 claim because of the prudential rule directing courts to avoid constitutional questions if the case can be decided on other grounds. At least one court has held, on facts similar to this case, that a plaintiff who loses a Section 1983 claim in the lower court is not entitled to fees on the basis of that claim where, as here, the reviewing court declines to address that claim on appeal.

In *American Automobile Manufacturers Ass'n v. Cahill*, 53 F. Supp. 2d at 174, plaintiffs sued to enjoin a state regulation mandating the sale of a certain clean air vehicle. Plaintiffs challenged the regulation on grounds that it was preempted by the federal Clean Air Act and violated the Due Process and Commerce Clauses. *Id.* at 177-178. Defendants successfully moved to dismiss all plaintiffs' claims, and plaintiffs appealed. *Id.* at 178-179. On appeal, the Second Circuit reversed, holding that the state regulation was preempted by the federal Clean Air Act. *Id.* at 179. Because the preemption decision resolved the lawsuit, the Second Circuit did not address on appeal the due process and Commerce Clause questions. *Id.* at 179.

One of the plaintiffs sought attorneys' fees pursuant to Section 1988. Relying on *Maher*, it argued that fees were recoverable because its constitutional claims were substantial, were undecided by the appellate court, and arose out of the same nucleus of facts as the successful preemption claim. *Id.* at 179-180. The court rejected this argument, holding that plaintiff's loss on its constitutional claims

barred the recovery of fees even though those claims were unaddressed by the court of appeals. *Id.* at 180-181.

The court contrasted the situation contemplated in *Maher* – an undecided federal constitutional claim – with the case before it where the plaintiff had litigated and lost those claims in the district court. *Id.* at 180. Those claims remained "decided" against the plaintiff, notwithstanding the appellate court's failure to address them. *Id.* "[T]o assume otherwise based on plaintiff's success in another claim," the court held, "is to turn a blind eye to the actual status of the case." *Id.*[7]

The Third Circuit Court of Appeals in *Luria Bros. & Co. v. Allen*, 672 F.2d 347 (3d Cir. 1982), correctly framed the issue as follows:

> Thus, the question reduces itself to one of statutory construction: if, as a result of an adjudication, one is the losing and not the prevailing party on a § 1983 claim, may he be entitled nevertheless to attorney's fees on the strength of his success on a related state law claim?

Id. at 357. The court answered the question "no," holding that Section 1988 "plainly limits fee awards to 'the prevailing party'" in an action to enforce Section 1983, and "[t]he losing party is not the prevailing party; what is black cannot be called white." *Id.* Nor, according to the court, was there any legislative intent by Congress "to treat a

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[7] Plaintiff was found to be entitled to fees on its alternative argument that the preemptive Clean Air Act conferred Section 1983 rights under the test articulated in *Blessing v. Freestone*, 520 U.S. 329 (1997). *Cahill*, 53 F. Supp. 2d at 182-186. Here, in contrast, plaintiffs' preemption claim based on the foreign affairs power did not implicate Section 1983. See Section IV below.

losing party in a § 1983 action as a 'prevailing party' simply because he prevails on a related state claim." *Id.*

The court in *Luria* contrasted the situation before it, where the plaintiff had adjudicated and lost his Section 1983 claim, with the situation where a court declines to resolve the fee bearing claim because a non-constitutional claim is dispositive. 672 F.2d at 357. Other circuit courts have made the same distinction, rejecting a fee award where the plaintiff loses his fee bearing claim, even if that claim is substantial and even if the plaintiff has obtained relief pursuant to his state law claim.

In *Haywood v. Ball*, 634 F.2d 740, 742-743 (4th Cir. 1980), for example, a plaintiff who had lost on his "substantial" constitutional claim, but had recovered both compensatory and punitive damages on his state law claim, was not entitled to Section 1988 attorneys' fees. See also *Bonner v. Guccione*, 178 F.3d 581, 595 (2d Cir. 1999) (*Maher* exception permitting fees where constitutional issue is avoided for prudential reasons could not "possibly be implicated in a case in which the federal claim . . . has been actually decided"); *Reel v. Arkansas Dep't of Correction*, 672 F.2d 693, 697-698 (8th Cir. 1982); *Raley v. Fraser*, 747 F.2d 287, 290-292 (5th Cir. 1984).

In *Mateyko v. Felix*, 924 F.2d 824 (9th Cir. 1991), *cert. denied*, 502 U.S. 814 (1991), the Ninth Circuit also recognized the limited scope of *Maher*. Discussing the House Report that accompanied Section 1988, the court noted Congress' concern about depriving a plaintiff of fees where he prevails on a pendent state law claim, but does not obtain an adjudication of the constitutional claim because of the prudential rule discouraging resolution of such claims. *Id.* at 828. "In such a case," the court said, "the

denial of fees would be unfair." *Id.* But where the district court "did not avoid reaching the constitutional issue because the pendent claim was dispositive" and instead held that plaintiff "had no constitutional claim," fees should be denied. *Id.* at 829.

These cases make clear that, contrary to the Ninth Circuit's decision in this case, the proper inquiry is not simply the end result of the litigation without regard to whether plaintiff has litigated and lost his Section 1983 claim. App., *infra*, 15. The determinant of a fee award is not, as the Ninth Circuit concluded, whether the plaintiff obtained his desired relief. *Id.* Instead, the focus must be on whether the plaintiff has prevailed, or can be assumed to have prevailed, on his Section 1983 claim.

In reaching its conclusion, the Ninth Circuit confused the gatekeeper issue of whether the insurers earned an entitlement to Section 1988 fees by prevailing (or, under *Maher*, by being assumed to have prevailed) on a Section 1983 claim, with the different issue of what fees a Section 1983 plaintiff may recover once he has established his right to Section 1988 fees. *Hensley v. Eckerhart*, 461 U.S. 424 (1983), on which the Ninth Circuit relied in its discussion of the importance of the "end result of the litigation" and the need to avoid "piecemeal examination" of the litigation (App., *infra*, 14-15), involved a plaintiff who had prevailed on his Section 1983 claim. The issue before the Court was whether that plaintiff could then recover fees for work spent on contentions in the case on which the plaintiff had not succeeded. Whatever the merit of permitting the recovery of such fees after the plaintiff has established his right to an award of fees, that right must first be established. It was not here.

This Court has recognized that merely obtaining the relief sought is not, by itself, sufficient to entitle a plaintiff to Section 1988 fees. *Buckhannon*, 532 U.S. at 600 (rejecting "catalyst" theory as basis for awarding fees); *Truck Council*, 515 U.S. at 592 (where relief available under state law but not pursuant to Section 1983, "[i]t follows that . . . no attorney's fees can be awarded under § 1988"). Cf. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285 (1993) ("Because respondents were not entitled to relief under § 1985(3), they were also not entitled to attorney's fees and costs under 42 U.S.C. § 1988.").

Where a plaintiff has lost his Section 1983 claim in the last court to decide the merits of that claim, he is *not* the prevailing party on that claim and did *not* vindicate any Section 1983 rights, privileges or immunities. The failure of a higher court to decide that claim does not mean, and should not mean, that the plaintiff is now assumed to have prevailed on his Section 1983 claim. To so hold would mean, in effect, that the lower court's decision on the merits of that claim was wrong and was being reversed.

That outcome is fundamentally at odds with the Ninth Circuit's own recognition that its decisions on the insurers' Commerce Clause and due process claims in *Gerling I* and *II* continue to have precedential value. The concurring opinion expressly acknowledged that the Ninth Circuit's Commerce Clause and due process decisions continue to have precedential effect (App., *infra*, 19 n.1), and the Ninth Circuit majority implied the same thing. App., *infra*, 15. Those decisions concluded that the insurers had not been deprived of any right, privilege or immunity granted by Section 1983. Those decisions, according to the Ninth Circuit, are still correct. Yet, for fee purposes, the Ninth Circuit ignored its decisions and the insurers' loss on their Section 1983 claims.

Congress and this Court in *Maher* were concerned about a plaintiff who was deprived of his day in court on his Section 1983 claim, not a plaintiff who had his day in court and lost. Neither the language of Section 1988, requiring that a plaintiff be the "prevailing party" on his Section 1983 claim, the legislative history of Section 1988, nor the public policy underlying *Maher* supports an award of fees where the plaintiff has lost that claim on the merits.[8]

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[8] None of the cases relied on by the insurers supports the *Gerling III* decision. In *Espino v. Besteiro*, 708 F.2d 1002 (5th Cir. 1983), the district court had granted preliminary injunctive relief based on a non-fee bearing statute, choosing to avoid plaintiff's constitutional claims for prudential reasons. *Id.* at 1004, 1007. The parties thereafter settled by agreeing to the injunctive relief sought by the plaintiff. *Id.* at 1004. Because of this disposition, no court ever reached the merits of plaintiff's fee-bearing constitutional claims. *Espino* is therefore an ordinary application of *Maher*.

In *Aubin v. Fudala*, 782 F.2d 287, 290-291 (1st Cir. 1986), the plaintiffs had prevailed on their civil rights claims. In *Williams v. Thomas*, 692 F.2d 1032 (5th Cir. 1982), the court applied *Maher* when it declined to rule on an appeal from a Section 1983 claim on which the plaintiff had technically prevailed in the lower court, and instead affirmed the plaintiff's win on the state law claim and directed an award of fees.

Nor does *Carreras v. City of Anaheim*, 768 F.2d 1039, 1050 (9th Cir. 1985), support the *Gerling III* decision. As the Ninth Circuit noted in *Gerling III* (App., *infra*, 11), the plaintiffs in *Carreras* had prevailed in part on their federal constitutional claim in the lower court. Moreover, the court of appeals in *Carreras* ruled that the district court should not have reached that claim in any event because state law disposed of the case in the plaintiffs' favor. 768 F.2d at 1042-1043. As such, the district court's decision on the federal constitutional question was "unnecessary" (*id.* at 1043), and the court effectively treated the claim as never decided for fee purposes, awarding fees based on a *Maher* analysis.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS

As explained in Section I above, the Ninth Circuit's decision to award attorneys' fees to plaintiffs that litigated and lost all their fee-generating claims on the merits is at serious odds with decisions of this Court and numerous circuits. This Court and others have held that a plaintiff must prevail (or be assumed to have prevailed) on a Section 1983 claim to be entitled to fees, that merely achieving the relief sought in the litigation is not enough to entitle a plaintiff to Section 1988 fees, and that a loss on the Section 1983 claim precludes a fee award. See *Truck Council*, 515 U.S. at 592; cf. *Buckhannon*, 532 U.S. at 600; *Bray*, 506 U.S. at 285; *Operation Rescue*, 37 F.3d at 653-654. The Ninth Circuit disregarded each of these core principles in deciding *Gerling III*.

These conflicts in principle warrant the grant of certiorari here. See *United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 719 (1985) (granting certiorari where the court of appeals' opinion appeared "to conflict, directly or in principle, with decisions of other Courts of Appeals"); *Ivan Allen Co. v. United States*, 422 U.S. 617, 623-624 (1975) (certiorari granted where decision conflicted in principle with another lower court decision and raised an important issue). See also Robert L. Stern, et al., *Supreme Court Practice* 225, 226 (8th ed. 2002) ("A conflict is sometimes asserted on the basis of differences between the general principles or the reasoning involved in the two decisions . . . [S]uch conflicts may move the court to grant certiorari, especially if the case is otherwise important.").

A conflict in principle justifies the grant of certiorari even if no other appellate court has decided the precise issue presented. *Begier v. IRS*, 496 U.S. 53, 57 n.2 (1990); *Supreme Court Practice* at 232.

The Ninth Circuit's decision is also flatly in conflict with at least one district court decision. *Cahill*, 53 F. Supp. 2d at 179-181. That conflict also supports the grant of certiorari here. See *Massachusetts v. United States*, 435 U.S. 444, 453 (1978) (certiorari granted on a conflict between a court of appeals decision and a single judge district court ruling); *Supreme Court Practice* at 238 (conflict between district and circuit court is a factor reinforcing some other basis of review, such as the importance of the question or "the confusing and differing judicial responses to that question").

The availability of fee awards in civil rights cases should not depend on where the case is brought. Plaintiffs who litigate and lose their civil rights claims in any court outside the Ninth Circuit may not recover fees. Plaintiffs who lose such claims in a Ninth Circuit court, on the other hand, may recover fees under *Gerling III*. That conflict should be resolved by this Court.

III. THIS COURT'S GRANT OF CERTIORARI ON THE INSURERS' FAILED SECTION 1983 CLAIMS AND ITS SUBSEQUENT DECISION NOT TO ADDRESS THOSE CLAIMS DID NOT CREATE AN ASSUMPTION FOR PURPOSES OF AWARDING FEES THAT THE INSURERS PREVAILED ON THOSE CLAIMS

This Court granted certiorari on plaintiffs' Commerce Clause and due process claims but did not address those

claims in its decision. *Garamendi*, 539 U.S. at 413 n.7. The Ninth Circuit panel majority in this case asserted that the Commissioner was unnecessarily concerned about whether its decision meant that the "mere grant of certiorari" would become a "benchmark for granting fees." App., *infra*, 15, n.2. The grant of certiorari, the panel majority said, "does not factor into the prevailing party calculation," since it is "only when the Supreme Court (or the court of highest authority to hear a case) rules in favor of a plaintiff and grants him the relief he sought will that plaintiff be considered prevailing under § 1988." *Id.*

That statement, as Judge Graber recognized in her concurrence (App., *infra*, 18-19), is simply not correct. It is only because this Court granted certiorari on the Commerce Clause and due process claims and then declined to decide those claims that the Ninth Circuit thought it could bring this case within *Maher* and award fees to the insurers. As Judge Graber inferred, and as the insurers conceded in their briefing (App., *infra*, 18, 30-31), had this Court not granted certiorari on those claims, the insurers would not be entitled to attorneys' fees even with their success on the foreign affairs claim.[9] The Ninth Circuit's decision misapprehends the purpose of this Court's certiorari jurisdiction and improperly burdens it.

First, this Court's review of an issue presented in a petition for certiorari is entirely discretionary, and no litigant has a right to have such an issue decided by this

[9] The panel majority's statement also confuses obtaining relief on *some* claim in the case with the "essential predicate" that a plaintiff must prevail, or be assumed to have prevailed, on its Section 1983 claim in order to justify Section 1988 fees. See discussion in Section I above.

Court, even if certiorari is granted. Supreme Court Rule 10; *Burrell v. McCray*, 426 U.S. 471, 472 (1976) (Stevens, J., concurring) (discussing the Court's "broad control of its discretionary docket"). The purpose of the Court's certiorari jurisdiction is to secure uniformity of decisions or to resolve important questions of public interest. *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). This Court does not grant certiorari "merely to give the defeated party in the Circuit Court of Appeals another hearing." *Id.* Under these circumstances, this Court's decision not to address the insurers' Commerce Clause and due process claims did not unfairly deprive the insurers of an opportunity to be heard on those claims, and *Maher* is irrelevant.

Second, this Court's grant of certiorari carried no implication of the Court's view of the merits of the insurers' Section 1983 claims. See *Tax Analysts v. United States Dep't of Justice*, 965 F.2d 1092, 1097 (D.C. Cir. 1992); *Jackson v. Maine*, 300 F. Supp. 2d 197, 199 (D. Me. 2004) (no significance attaches to Supreme Court grant or denial of certiorari). Nor is it appropriate to infer that this Court overruled the Ninth Circuit's rulings on the merits of those issues when it decided not to address them. See *Texas v. Cobb*, 532 U.S. 162, 169 (2001) ("Constitutional rights are not defined by inferences from opinions which did not address the question at issue."). This Court did not vacate the Ninth Circuit's rulings on the Commerce Clause and due process claims, and, as the Ninth Circuit recognized (App., *infra*, 15 and 19 n.1), the insurers' losses on those claims remained in place after this Court's disposition of the case. See *Central Pines Land Co. v. United States*, 274 F.3d 881, 893-894 and n.57 (5th Cir. 2001); 18 *Moore's Federal Practice* § 134.05[5] (3d ed. 2005).

If *Maher* is extended to encompass failed Section 1983 claims that this Court leaves "unaddressed," then this Court, which is not bound to decide any claim that it agrees to hear, will have created a fee-generating event by the grant of certiorari. Neither Supreme Court Rule 10 nor any case of which the Commissioner is aware refers to the potential fee bearing character of an issue as an appropriate factor for this Court to consider in deciding whether to grant certiorari. Yet, the attachment of fee significance to that grant, evident here, would create just such a factor.

IV. FOREIGN AFFAIRS PREEMPTION DOES NOT CREATE INDIVIDUAL SECTION 1983 RIGHTS

The district court held that this Court's foreign affairs preemption ruling in *Garamendi* was not one that enforced any right or immunity secured to the insurers by the Constitution or federal law. App., *infra*, 24-26. Judge Graber's concurring opinion in *Gerling III* expressly recognized that such foreign affairs preemption does not create individual Section 1983 rights (App., *infra*, 18), and the Ninth Circuit panel majority in that decision assumed, but did not decide, the same thing. App., *infra*, 9 and 17. The district court and Judge Graber were correct.

A. The Supremacy Clause Is Not A Source Of Individual Section 1983 Rights

Section 1983 provides private plaintiffs a means to enforce "rights, privileges, or immunities secured by the Constitution and laws." The statute "is not itself a source of substantive rights, but rather a method for vindicating federal rights elsewhere conferred by those parts of the

United States Constitution and federal statutes that it describes." *Baker v. McCollan*, 443 U.S. 137, 145 n.3 (1979); see also *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979) ("[O]ne cannot go into court and claim a 'violation of § 1983' – for § 1983 by itself does not protect anyone against anything.").

Similarly, the Supremacy Clause itself does not create individual federal rights. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107-108 (1989) ("'[The Supremacy] [C]lause is not a source of any federal rights'; it 'secures federal rights by according them priority whenever they come in conflict with state law.'") (quoting *Chapman*, 441 U.S. at 613). Thus, a Supremacy Clause claim "is enforceable under § 1983 only when the [preemptive federal law] creates 'rights, privileges or immunities' in the particular plaintiff." *Golden State*, 493 U.S. at 108 n.4.[10]

To provide a basis for a Section 1983 action, the preemptive federal law must "unambiguously confer" an individually enforceable right. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) ("[I]t is only violations of *rights*, not *laws*, which give rise to § 1983 actions. . . . [O]ur cases [do not] permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983.") (emphasis in original). In determining whether a violation of a federal right exists for purposes of Section 1983, this Court relies on its "implied right of action" jurisprudence and asks whether the preemptive federal provision was

[10] This distinguishes the Supremacy Clause from the Commerce Clause, which this Court has found does secure an individual "right to engage in interstate trade free from restrictive state regulation." *Dennis v. Higgins*, 498 U.S. 439, 448 (1991).

intended to confer individual rights on a particular class of persons. *Id.* at 283, 285, 286.

B. The Federal Foreign Policy For Resolving Holocaust Claims Reflected In Executive Agreements With Other Nations Did Not Unambiguously Confer Section 1983 Rights On The Insurers

In *Garamendi*, this Court held that the HVIRA was preempted because it conflicted with the federal government's exercise of its foreign policy favoring consensual resolution of Holocaust-era insurance claims. See *Garamendi*, 539 U.S. at 427 ("The question relevant to preemption in this case is conflict, and the evidence here is more than sufficient to demonstrate that the [HVIRA] stands in the way of the President's diplomatic objectives.") (internal quotation marks and alteration omitted). This foreign policy was reflected in executive agreements between the United States and Germany, Austria, and France, and in the government's support for the International Commission on Holocaust Era Insurance Claims (ICHEIC). *Id.* at 403, 413.

This expression of foreign policy did not create individual rights. As this Court recognized, the doctrine of foreign affairs preemption invalidates state laws that conflict with the President's authority to conduct the Nation's foreign affairs. *Garamendi*, 539 U.S. at 413-414. Thus, this Court held that the HVIRA was unconstitutional, not because it violated any person's rights, but rather because "state law must give way where, as here, there is evidence of clear conflict between the policies adopted" by the federal Executive Branch and California over matters of international interest thought to arise out

of World War II. *Id.* at 421. The capacity of the President to conduct foreign affairs is patently a matter of collective, rather than individual, concern, and the Executive's exercise of its foreign affairs power here was not intended to confer any rights on the insurers.

Neither the executive agreements nor the federal policy they reflect unambiguously conferred any rights on the insurers that are enforceable under Section 1983. Instead, their purpose was to provide Holocaust victims with "some measure of compensation" through "voluntary, non-adversarial mechanisms." App., *infra*, 34-35, 36. While this approach might also further the insurers' interest in avoiding litigation or regulatory action, the federal government took this course expressly because it "serves the interests of Holocaust victims and their families" and also "serves important interests of the Nation in cooperative relations with its European allies." App., *infra*, 37. Presumably, under this Court's analysis, if the President had decided that the HVIRA would better assist survivors in resolving their claims, the statute would not have been preempted, even though it "harmed" the insurers, because the statute would no longer conflict with the President's policy.

At best, the insurers are "incidental" beneficiaries of the executive agreements – a status insufficient to permit suit under Section 1983 because "it is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of that section." *Gonzaga*, 536 U.S. at 283 (emphasis in original); see also *Golden State*, 493 U.S. at 109 (where federal law benefits a particular party "only as an incident of the federal scheme of regulations," a Section 1983 remedy is not available). "The question is not simply who would benefit from the [federal

law], but whether [the federal government] intended to confer federal rights upon those beneficiaries." *Gonzaga*, 536 U.S. at 286.[11]

In sum, the HVIRA was not preempted because it interfered with any insurer right, but because it conflicted with the President's ability to conduct foreign policy. This conflict does not even remotely suggest the grant of some enforceable Section 1983 right to the insurers, let alone an unambiguous grant of such right. Accordingly, preemption of the HVIRA on these grounds does not provide any basis for a Section 1983 claim and an award of attorneys' fees pursuant to Section 1988.

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[11] Nor does the plain language of these executive agreements reflect any intent by the federal government to confer any rights on the insurers. As the government recognized in an *amicus* brief filed in the Ninth Circuit, the insurers were not promised "legal peace." App., *infra*, 32-33.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GERLING GLOBAL REINSURANCE CORPORATION OF AMERICA, US Branch; GERLING GLOBAL LIFE REINSURANCE COMPANY; GERLING GLOBAL LIFE INSURANCE COMPANY; GERLING AMERICA INSURANCE COMPANY; CONSTITUTION INSURANCE COMPANY; REVIOS REINSURANCE CANADA, LTD.; REVIOS REINSURANCE U.S., INC.; ASSICURAZIONI GENERALI S.P.A.; AMERICAN INSURANCE ASSOCIATION; AMERICAN RE-INSURANCE COMPANY,

Plaintiffs-Appellants,

and

WINTERTHUR INTERNATIONAL AMERICA INSURANCE COMPANY; WINTERTHUR INTERNATIONAL AMERICA UNDERWRITERS INSURANCE COMPANY; GENERAL CASUALTY COMPANY OF WISCONSIN; REGENT INSURANCE COMPANY; REPUBLIC INSURANCE COMPANY; SOUTHERN INSURANCE COMPANY; UNIGARD INDEMNITY COMPANY; UNIGARD INSURANCE COMPANY; BLUE RIDGE INSURANCE CO.,

Plaintiffs,

v.

JOHN GARAMENDI, in his capacity as the Insurance Commissioner of the State of California,

Defendant-Appellee.

No. 04-15332
D.C. No.
CV-00-00506-WBS

AMERICAN INSURANCE ASSOCIATION; AMERICAN RE-INSURANCE COMPANY,

Plaintiffs-Appellants,

v.

JOHN GARAMENDI, in his capacity as the Insurance Commissioner of the State of California,

Defendant-Appellee.

No. 04-15455
D.C. No.
CV-00-00613-
WBS/JFM
ORDER AND
AMENDED
OPINION

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, Chief Judge, Presiding

Argued and Submitted
December 13, 2004 – Pasadena, California

Filed March 10, 2005
Amended June 3, 2005

Before: Alfred T. Goodwin, Susan P. Graber,
and Richard A. Paez, Circuit Judges.

Opinion by Judge Goodwin;
Concurrence by Judge Graber

COUNSEL

Charles A. Rothfeld, Mayer, Brown, Rowe & Maw, LLP, Washington, D.C., for the plaintiffs-appellants.

Frank Kaplan, Alschuler Grossman Stein & Kahan, LLP, Santa Monica, California, for the defendant-appellee.

ORDER

The opinion filed March 10, 2005, slip op. 3137 and appearing at 400 F.3d 803 (9th Cir. 2005), is amended as follows:

400 F.3d at 809 (slip op. at 3150, 10th line from the bottom of the page): Following the citation at the end of the sentence, "We conclude that the unaddressed due process and Commerce Clause claims . . . pass the 'substantiality' test and therefore support an award of fees to the plaintiffs," add the following footnote and renumber the subsequent footnotes accordingly:

> FN 1: The Commissioner and Amici argue that this result is contrary to *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582, 592 (1995). *Truck Council* held that where an adequate state law remedy exists in a state tax case, federal courts are not permitted to award declaratory or injunctive § 1983 relief. *Id.* at 589. The Court affirmed the Oklahoma Supreme Court's rejection of the plaintiff's § 1983 claims and declined to award § 1988 attorney's fees because § 1983 relief could not be awarded. *Id.* at 592. The *Truck Council* holding is entirely consistent with our decision. If a plaintiff does not have a substantial, properly cognizable § 1983 claim, then § 1988 attorney's fees may not be awarded. In addition, if the Supreme Court in this case had expressly affirmed *Gerling II*'s rejection of plaintiff's due process and Commerce Clause claims, then plaintiffs would not be entitled to § 1988 fees.

With the opinion thus amended, the panel has voted unanimously to deny the petition for rehearing. Judges Graber and Paez have voted to deny the petition for rehearing en banc, and Judge Goodwin recommended denial.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

No subsequent petitions for rehearing or petitions for rehearing en banc may be filed.

GOODWIN, Senior Circuit Judge:

OPINION

This case returns to our calendar for the fourth time following its journey to the Supreme Court. Plaintiffs, three insurance companies and one insurance trade association, originally brought this action against the California Commissioner of Insurance ("Commissioner") seeking to bar the enforcement of the Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"), Cal. Ins. Code §§ 13800-13807 (1999). That statute requires the disclosure of certain information pertaining to Holocaust-era insurance policies written in Europe. Following the Supreme Court's disposition of the case in their favor, plaintiffs sought attorney's fees in this court. We remanded the

fees question to the district court, which denied the request. The appealable order was appealed.

This appeal presents two principal questions. First, did the district court err when it held that plaintiffs were not prevailing parties within the meaning of 42 U.S.C. § 1988? Second, do the foreign affairs power of the Executive branch and the related executive agreements between the United States, Germany, Austria, and France create private rights within the meaning of 42 U.S.C. § 1983?

We hold that plaintiffs are prevailing parties and are thus entitled to an award of a reasonable attorney's fee. Because we hold that plaintiffs are prevailing parties, we do not reach the question whether executive actions under the foreign affairs power create justiciable private rights. Therefore, under the authority of *Maher v. Gagne*, 448 U.S. 122 (1980), we remand to the district court for a determination of the proper fee.

I. Factual Background and Procedural History

Because the facts of this case have been set forth by this court and by the Supreme Court in detail, *see Gerling Global Reinsurance Corp. of Am. ("Gerling Global") v. Low*, 240 F.3d 739, 754 (9th Cir. 2001) ("*Gerling I*"); *Gerling Global v. Low*, 296 F.3d 832 (9th Cir. 2002) ("*Gerling II*"); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), we recount only the basic procedural history here.

Plaintiffs brought this action seeking declaratory and injunctive relief from the enforcement of HVIRA, claiming that the statute violated the Commerce Clause, Due Process Clause, foreign affairs power, and other constitutional provisions. The district court concluded that plaintiffs

"demonstrated a probability of success on the merits that the HVIRA is unconstitutional in violation of the federal foreign affairs power and a violation of the Commerce Clause." *Gerling Global v. Quackenbush*, 2000 WL 777978, *13 (E.D. Cal. June 9, 2000). After finding that the balance of irreparable harm favored the plaintiffs, the district court granted a preliminary injunction and enjoined the enforcement of HVIRA and its implementing regulations. *Id.* at *13-14.

The Commissioner appealed and we reversed, leaving the preliminary injunction in place. We remanded the case to the district court to consider plaintiffs' due process claims. *Gerling I*, 240 F.3d at 754.

On remand, the district court granted plaintiffs' motion for summary judgment and permanently enjoined the Commissioner from enforcing HVIRA, holding that "[b]y mandating license suspension for non-performance of what may be impossible tasks without allowing for a meaningful hearing, HVIRA deprives plaintiffs of a protected property interest without affording them due process of law." *Gerling Global v. Low*, 186 F. Supp. 2d 1099, 1113 (E.D. Cal. 2001).

The Commissioner again appealed the district court decision. During the pendency of that appeal, the plaintiffs filed a motion with the district court seeking attorney's fees under 42 U.S.C. § 1988. The district court denied the motion, and plaintiffs timely appealed.

In *Gerling II*, we reversed the district court and held that HVIRA did not violate plaintiffs' due process rights, the Commerce Clause, the foreign affairs power, the Bill of Attainder Clause, the Contract Clause, the Equal Protection Clause, or the Fourth Amendment. 296 F.3d 832. We

concluded that plaintiffs were not "prevailing parties" under 42 U.S.C. § 1988 and therefore were not entitled to attorney fees. *Id.* at 851.

The Supreme Court granted certiorari. *Am. Ins. Ass'n v. Low*, 537 U.S. 1100 (2003). The grant of certiorari "encompassed three of the questions addressed [in *Gerling I* and *Gerling II*]: whether HVIRA intrudes on the federal foreign affairs power, violates the self-executing element of the Foreign Commerce Clause, or exceeds the State's 'legislative jurisdiction.'" *Am. Ins. Ass'n*, 539 U.S. at 413 n.7. The Court reversed this court's judgment, holding that HVIRA was pre-empted by Executive Branch authority over foreign policy. *Id.* at 420. The Court did not address the Commerce Clause and Due Process Clause issues. *Id.* at 413 n.7 ("Because we hold that HVIRA is preempted under the foreign affairs doctrine, we have no reason to address the other questions.").

Following the Court's decision, plaintiffs sought attorney's fees and moved this court for supplemental briefing and oral argument. We transferred the fee issue to the district court for consideration on a factual record. *Gerling Global v. Low*, 339 F.3d 1078 (9th Cir. 2003) ("*Gerling III*").

The district court declined to award fees because it concluded that the foreign affairs power did not implicate "a right, privilege, or immunity secured by the Constitution or laws of the United States" and therefore could not form the basis of a 42 U.S.C. § 1983 claim.

II. The Prevailing Party Determination

The Civil Rights Attorney's Fee Award Act of 1976 provides, in relevant part: "In any action or proceeding to enforce a provision of [42 U.S.C. § 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). 42 U.S.C. § 1983, in turn, protects against the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." The first issue is whether plaintiffs constitute "prevailing parties."

The Supreme Court has summarized the "prevailing party" determination as follows:

> [T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, [*Hewitt v. Helms*, 482 U.S. 755, 760, 107 S. Ct. 2672, 96 L.Ed.2d 654 (1987)], or comparable relief through a consent decree or settlement, *Maher v. Gagne*, 448 U.S. 122, 129, 100 S. Ct. 2570, 65 L.Ed.2d 653 (1980). Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. *See Hewitt*, [482 U.S. at 764] . . . In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

Farrar v. Hobby, 506 U.S. 103, 111-12 (1992). We hold that plaintiffs are prevailing parties in this litigation. Plaintiffs not only obtained "some" relief on the merits of their claim, they received all of the relief they sought in their

lawsuit – a permanent injunction enjoined the enforcement of HVIRA. Clearly, the ruling of the Supreme Court modified the Commissioner's behavior by "materially alter[ing] the legal relationship between the parties." *See id.*

The second issue is whether the plaintiffs prevailed under a fee-generating legal "right." The Supreme Court decided for the plaintiffs relying on the implied preemption of HVIRA by the foreign affairs power of the Executive branch. The Commissioner argues that, because the Supreme Court ruled in favor of plaintiffs on a ground not covered by § 1983, the plaintiffs are not § 1988 prevailing parties. We are thus faced with the question whether a court, in an action containing both fee-supporting § 1983 claims and a claim which may not independently support a fee award, may deprive plaintiffs of attorney's fees by grounding its ruling on the non-fee-generating claim. Answering this question in the affirmative would be inconsistent with both Supreme Court and Ninth Circuit precedent.

Beginning with the assumption that the foreign affairs power does not confer rights within the meaning of § 1983, we must determine whether the claims left unaddressed by the Supreme Court, but included in its grant of certiorari – the Commerce Clause and Due Process Clause claims – may support an award of attorney's fees. Due Process Clause and Commerce Clause claims are both properly cognizable, fee-supporting claims under § 1983. *See, e.g., Dennis v. Higgins,* 498 U.S. 439, 446 (1991) (Commerce Clause); *Paul v. Davis,* 424 U.S. 693, 696-97 (1976) (Due Process Clause). Plaintiffs urge us to apply *Maher v. Gagne,* 448 U.S. 122 (1980), and its progeny to conclude that fees are appropriate here because the

unaddressed claims were both substantial and arose from a common nucleus of operative fact with the foreign affairs power claim.

Maher held that an award of fees is appropriate where a "plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim or in one in which both a statutory and a substantial constitutional claim are settled favorably to the plaintiff without adjudication." *Id.* at 132. The plaintiff in *Maher* advanced claims under the Social Security Act and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *Id.* at 124-25. The parties settled through a consent decree before a final adjudication of any of the claims. *Id.* at 126 & n.8. Noting that "[n]othing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated," and emphasizing the policy supporting a broad reading of the fees statutes, the Court affirmed the award of fees to the plaintiff. *Id.* at 129-30.

Although the matter in *Maher* was settled through a consent decree, the *Maher* holding applies equally to the determination of pendent claims through litigation. *See, e.g., Carreras v. City of Anaheim*, 768 F.2d 1039, 1050 (9th Cir. 1985), *abrogated on other grounds by Los Angeles Alliance for Survival v. City of Los Angeles*, 993 P.2d 334 (Cal. 2000) (awarding fees where plaintiff prevailed, through litigation, on pendent state constitutional law claims).

Carreras provides some guidance here because it demonstrates *Maher*'s applicability in the context of litigation, but it is not the panacea plaintiffs propose. In

that case, the International Society for Krishna Consciousness of Laguna Beach, Inc. (ISKCON) sued the City of Anaheim over the city's prohibition of ISKCON's practice of soliciting donations in the parking areas and walkways surrounding the Anaheim Stadium and the Anaheim Convention Center. 768 F.2d at 1041. The district court, relying on federal constitutional law, held that ISKCON was not entitled to relief as to the stadium area because that area was not a public forum. *Id.* at 1045 & n.10. However, the district court did grant ISKCON relief with respect to the convention center, also relying upon federal law in reaching its conclusion. *Id.* at 1046 & n.15. On appeal, this court did not reach the federal constitutional question but, relying on the California constitution, we reversed the district court's holding on the stadium issue. Despite the fact that we did not explicitly reverse the district court's federal constitutional analysis, *see id.* at 1045 n.10, we relied on *Maher* to award attorney's fees. *Id.* at 1050. We are aware that *Carreras* is distinguishable because ISKCON did prevail on a fee-supporting claim – the convention center claim – at the district court level. Moreover, we reversed the district court's convention center holding on different grounds, rather than avoiding that issue altogether. However, we do not read *Carreras* to impose a limit on our ability to award a fee in this case. Rather, we read *Carreras*'s application of *Maher* to support an award of fees where, as here, the court of highest authority to hear a case avoids resolution of a fee-supporting federal claim.

A. Applicability of Maher

Maher advocated a "substantiality test" for determining whether a pendent claim can support an award of fees:

> In some instances . . . the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. [*Hagans v. Lavine*, 415 U.S. 528 (1974)]. In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, *see* [*id.* at 537-38; *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966)], attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' [*Gibbs*, 383 U.S. at 725].

Maher, 448 U.S. at 132 n.15 (quoting H.R. Rep. No. 1558, at 4 n.7 (1976)). Under this formulation, we conclude that, for the purpose of qualifying a prevailing party, an unaddressed, fee-supporting claim supports an award of fees if it is both substantial and arises from a common nucleus of operative fact with a dispositive, non-fee-supporting claim addressed by the court. That the substantiality test speaks of situations in which a "non-constitutional claim is dispositive" does not dilute its relevance when a claim, such as the implied preemption claim at issue here, may be termed a "constitutional claim." A court's decision to resolve one constitutional question and to avoid others does not exempt the attorney's fee question from the reasoning of *Maher*.

We turn now to the application of the *Maher* substantiality test to the Due Process Clause and Commerce Clause claims. A claim is constitutionally insubstantial if it is "essentially fictitious . . . wholly insubstantial . . . obviously frivolous . . . [or] obviously without merit." *Hagans*, 415 U.S. at 537-38 (quotations and citations omitted). This panel has twice grappled with the fee-supporting issues in

detail. *See Gerling I*, 240 F.3d at 754; *Gerling II*, 296 F.3d 832. The extent of our previous analysis demonstrates that the Due Process Clause and Commerce Clause claims brought by plaintiffs were not constitutionally insubstantial.

Claims arise from a common nucleus of operative fact where fee-supporting claims are so interrelated with non-fee claims that plaintiffs "would ordinarily be expected to try them all in one judicial proceeding." *Gibbs*, 383 U.S. at 725. The three claims to which the Supreme Court granted certiorari all arose from California's attempted enforcement of HVIRA. Plaintiffs correctly attempted to try all of their issues in one proceeding. We conclude that the unaddressed due process and Commerce Clause claims, which remained in the case until the final disposition by the Supreme Court, pass the "substantiality" test and therefore support an award of fees to plaintiffs. *Cf. Maher*, 448 U.S. at 131 ("Although . . . the trial judge did not find any constitutional violation, the constitutional issues remained in the case until the entire dispute was settled by the entry of a consent decree.").[1]

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[1] The Commissioner and Amici argue that this result is contrary to *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582, 4592 (1995). *Truck Council* held that where an adequate state law remedy exists in a state tax case, federal courts are not permitted to award declaratory or injunctive § 1983 relief. *Id.* at 589. The Court affirmed the Oklahoma Supreme Court's rejection of the plaintiff's § 1983 claims and declined to award § 1988 attorney's fees because § 1983 relief could not be awarded. *Id.* at 592. The *Truck Council* holding is entirely consistent with our decision. If a plaintiff does not have a substantial, properly cognizable § 1983 claim, then § 1988 attorney's fees may not be awarded. In addition, if the Supreme Court in this case had expressly affirmed *Gerling II*'s rejection of plaintiff's

(Continued on following page)

B. Our Previous Holdings

We must note that the fee determination is further complicated by the lengthy procedural history of the case, forcing us to address our previous holdings in *Gerling I* and *Gerling II*. Recognizing the admonition of the Supreme Court that "[a] request for attorney's fees should not result in a second major litigation," *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), we briefly revisit those cases in order to put to rest the Commissioner's contention that plaintiffs cannot be considered "prevailing parties" because we previously rejected their due process and Commerce Clause claims. In *Gerling I*, we held that the district court erroneously concluded that plaintiffs demonstrated a likelihood of success on the Commerce Clause issue. 240 F.3d at 751. We further held, incorrectly, it turned out, that HVIRA did not conflict with the foreign affairs power. *Id.* at 753. In *Gerling II*, we repeated our conclusion that HVIRA did not violate the Commerce Clause or the foreign affairs power, and we determined that HVIRA also did not violate plaintiffs' due process rights. 296 F.3d at 844, 849.

As discussed above, the Supreme Court did not reach either the Commerce Clause or the due process issues. Even aside from plaintiff's contention that our Commerce Clause and due process holdings were impliedly overruled by *American Insurance Ass'n*, 539 U.S. 396, however, we conclude that in exercising its discretion to award attorney's fees, a district court must focus on whether a plaintiff "succeed[s] on any significant issue in litigation which

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due process and Commerce Clause claims, then plaintiffs would not be entitled to § 1988 fees.

achieves some of the benefit the parties sought in bringing the suit." *Hensley*, 461 U.S. at 433 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)).

The proper inquiry zeros in on the end result of the litigation: A piecemeal examination of the arguments that the court of final authority did or did not reach may be helpful in determining our prior opinions' precedential value, but it is not helpful in determining whether a plaintiff is a "prevailing party" within the meaning of § 1988 at the conclusion of the litigation. *See id.* at 435 ("Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.").[3] So long as an unaddressed, fee-supporting claim meets the substantiality test set forth above, and the end result of the litigation grants a plaintiff his desired relief, the unaddressed claim may support a fee award regardless of the decision of the court below. Accordingly, we conclude that our holdings in *Gerling I* and *Gerling II* do not preclude the district court from exercising its discretion to award a reasonable attorney's fee under *Maher*.

We are not unaware of our holding in *Mateyko v. Felix*, 924 F.2d 824, 828 (9th Cir. 1991). In that case, the court did not invoke principles of avoidance; rather, "it found

[3] Focusing on the end result of the litigation should answer the Commissioner's concern that the "mere grant of certiorari" will become a benchmark for granting fees. The grant of certiorari does not factor into the prevailing plaintiff calculation – only when the Supreme Court (or the court of highest authority to hear a case) rules in favor of a plaintiff and grants him the relief he sought will that plaintiff be considered prevailing under § 1988.

that [Mateyko] had no constitutional claim at all," and granted a directed verdict on all of the § 1983 claims. *Id.* at 829 (quoting *Reel v. Ark. Dep't of Corr.*, 672 F.2d 693, 698 (8th Cir. 1982)). A jury, reviewing the remaining state law claims, found Mateyko was 96% contributorily negligent for his state negligent infliction of emotional distress claim, and entered a judgment in his favor for 4% of his damages. *Id.* at 825. We rejected Mateyko's claim that this small victory made him a prevailing plaintiff. *Id.* at 828-29. This result is consistent with our holding above because, at the conclusion of litigation and after we affirmed the directed verdict, no fee-supporting claims remained in the case – Mateyko could not invoke *Maher* because there *was no* unaddressed fee-supporting claim which could pass *Maher*'s substantiality test. In such a case, awarding an attorney's fee is inappropriate.

C. Policy Considerations

Quite apart from the applicability of *Maher*, the policy behind the enactment of § 1988 and the prudential policy of avoiding constitutional questions further supports the conclusion that plaintiffs should be awarded a reasonable fee in this case. "As the legislative history illustrates and as [the Supreme Court] has recognized, § 1988 is a broad grant of authority to courts to award attorney's fees to plaintiffs seeking to vindicate federal constitutional and statutory rights." *Smith v. Robinson*, 468 U.S. 992, 1006 (1984), *overruled on other grounds by* 20 U.S.C. § 1415(*l*). Furthermore, as stated in *Maher*, a fee award based on pendent claims "furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues." 448 U.S. at 133 (quoting *Gagne v. Maher*, 594 F.3d 336,

342 (2d Cir. 1979)). We decline the Commissioner's invitation to conclude that the Supreme Court must rule in favor of a plaintiff on a specific, fee-supporting aspect of the case in order for a plaintiff to be considered a prevailing party. Rather, applying the Supreme Court's "generous formulation" of the prevailing party definition, *see Farrar*, 506 U.S. at 109 (quoting *Hensley*, 461 U.S. at 433 (1983)), we hold that the district court read § 1988 too narrowly and assumed that it lacked discretion to award plaintiff insurance companies a reasonable attorney's fee.

III. The Foreign Affairs Power and § 1983

The district court concluded that the foreign affairs power did not "implicate a right, privilege or immunity secured by the Constitution or laws of the United States" and therefore did not constitute a § 1983 claim. That conclusion may have been correct as an abstract proposition, but it did not support the further conclusion that plaintiffs were not prevailing parties. Because we reverse the district court on the prevailing party point, we need not reach the question whether the foreign affairs power independently confers private rights. The fact that plaintiffs' Due Process Clause and Commerce Clause claims *are* properly cognizable claims under § 1983 satisfies our inquiry and should result in a fee award to plaintiffs.

IV. Conclusion

For the reasons set forth above, we REVERSE the denial of § 1988 attorney's fees and REMAND this case to the district court with instructions to exercise its discretion to determine a reasonable amount of attorney's fees in accordance with *Hensley*, 461 U.S. 424, and *Webb v. Sloan*, 330 F.3d 1158, 1167-70 (9th Cir. 2003). The award shall

include an allowance for fees and costs incurred in contesting the district court's denial of fees.

GRABER, Circuit Judge, concurring in the result:

I concur in the result for the following reasons.

1. The claim of preemption by the foreign affairs power is not a fee-generating claim, for the reasons ably explained by the district court. In short, the foreign affairs power, like the Supremacy Clause, creates no individual rights enforceable under 28 U.S.C. § 1983. *Cf. Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989) ("[T]he Supremacy Clause, of its own force, does not create rights enforceable under § 1983."); *Associated Gen. Contractors v. Smith*, 74 F.3d 926, 931 (9th Cir. 1996) ("[P]reemption of state law under the Supremacy Clause – being grounded not on individual rights but instead on considerations of power – will not support an action under section 1983, and will not, therefore, support a claim for attorneys' fees under section 1988." (alteration in original) (internal quotation marks omitted)).

2. The due process and Commerce Clause claims are fee-generating claims under 28 U.S.C. §§ 1983 and 1988. But Plaintiffs lost those claims before this court.

3. Plaintiffs' entitlement to fees, then, depends on what happened to the various claims at the Supreme Court. Had Plaintiffs not sought certiorari on the fee-generating claims, or had the Supreme Court upheld our result on those claims, Plaintiffs would not be entitled to fees. *See Mateyko v. Felix*, 924 F.2d 824, 828 (9th Cir. 1991) ("Where, as here, there has been a decision adverse to plaintiff on the section 1983

claim, section 1988 does not authorize the award of attorney's fees."). But neither of those things happened here.

Rather, Plaintiffs sought and received a writ of certiorari on both their fee-generating claims and their non-fee-generating claim. The Court held in Plaintiffs' favor on the non-fee-generating claim without reaching the fee-generating claims at all. Under the principles that we announced in *Carreras v. City of Anaheim*, 768 F.2d 1039, 1050 (9th Cir. 1985), *abrogated on other grounds by Los Angeles Alliance for Survival v. City of Los Angeles*, 993 P.2d 334 (Cal. 2000), and that the Supreme Court set forth in *Maher v. Gagne*, 448 U.S. 122, 132-33 (1980), Plaintiffs are entitled to fees. The Supreme Court had the opportunity to decide the fee-generating claims and chose not to do so;[1] the policies identified in *Carreras* and *Maher* therefore counsel in favor of awarding fees.

[1] The Court's decision thereby leaves our opinion in *Gerling Global Reinsurance Corp. of America v. Low*, 296 F.3d 832 (9th Cir. 2002), *rev'd sub nom American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), with precedential effect on those issues.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GERLING GLOBAL REINSURANCE CORP. OF AMERICA, et al.,

Plaintiffs,

v.

JOHN GARAMENDI, in his capacity as the INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,

Defendant.

NO. CIV. S-00-0506 WBS JFM

Consolidated Cases:
No. CIV. S-00-0613 WBS JFM
No. CIV. S-00-0779 WBS JFM
No. CIV. S-00-0875 WBS JFM

MEMORANDUM AND ORDER

(Filed Jan. 29, 2004)

After the Supreme Court's decision in this case, plaintiffs moved the Ninth Circuit for supplemental briefing and oral argument on the issue of attorney fees. The Ninth Circuit ordered the issue of attorney fees transferred to this court for briefing and reconsideration. This matter is now before the court on plaintiffs' motion for attorney fees.

I. Procedural Background

On June 9, 2000, this court issued a preliminary injunction after ruling that plaintiffs had established the likelihood of irreparable harm and a probability of success on the merits of their claims that the California Holocaust Victim Insurance Relief Act ("HVIRA") violates the Commerce Clause and the foreign affairs power. *Gerling Global*

Reinsurance Corp. of Am. ("Gerling Global") v. Quackenbush, Nos. CIV. S-00-0506 WBS JFM, CIV. S-00-0613 WBS JFM, CIV. S-00-0779 WBS JFM, CIV. S-00-0875 WBS JFM, 2000 WL 777978 (E.D. Cal. June 9, 2000).

On February 7, 2001, the Ninth Circuit held that "the district court erred when it decided that HVIRA violates the dormant Commerce Clause and the foreign affairs power." *Gerling Global v. Low*, 240 F.3d 739, 754 (9th Cir. 2001). The Ninth Circuit, however, left the preliminary injunction in place and remanded the matter to this court to address whether the HVIRA violates the Due Process Clause. *Id.*

On October 2, 2001, this court granted plaintiffs' motion for summary judgment, holding that the HVIRA violates the Due Process Clause, and permanently enjoined defendant from enforcing the HVIRA. *Gerling Global v. Low*, 186 F. Supp. 2d 1099 (E.D. Cal. 2001). On October 16, 2001, defendant appealed the grant of summary judgment to the Ninth Circuit. During the pendency of this appeal, plaintiffs moved this court for an award of attorney fees pursuant to, *inter alia*, 42 U.S.C. § 1988. On January 14, 2002, this court denied plaintiffs' motion for an award of attorney fees.

On September 9, 2002, the Ninth Circuit reversed this court's order of October 2, 2001, holding, *inter alia*, that the HVIRA does not violate the Due Process Clause, the Commerce Clause, or the foreign affairs power. *Gerling Global v. Low*, 296 F.3d 832 (9th Cir. 2002). The Ninth Circuit did not address the merits of this court's January 14, 2002, attorney fees ruling. Instead, the Ninth Circuit stated: "[T]he district court improperly concluded that HVIRA was unconstitutional, it also erred in concluding

that Plaintiffs were 'prevailing parties' for the purposes of 42 U.S.C. § 1988. They are not entitled to fees." *Id.*, at 851.

On June 23, 2003, the Supreme Court reversed the Ninth Circuit, holding that the HVIRA violates the foreign affairs power. *Am. Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374 (2003). Subsequently, plaintiffs moved the Ninth Circuit for supplemental briefing and oral argument on the issue of attorney fees. On September 9, 2003, the Ninth Circuit denied plaintiffs' motion and ordered that "[t]he issue of attorney fees is transferred to the district court for briefing and reconsideration." (Oct. 31, 2003 Joint Status Conference Report, Ex. A (*Gerling Global v. Garamendi*, Nos. 01-17023, 01-17433, 02-15282 (9th Cir. Sept. 9, 2003))).

II. Discussion

Section 1988 of Title 42 of the United States Code provides that "[i]n any action or proceeding to enforce a provision of section[] . . . 1983, . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee." 42 U.S.C. § 1988(b).

The prevailing party in an action under section 1983 "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). The court must examine "two factors in determining whether a case involves a 'special circumstance' justifying the denial of fees: (1) whether allowing attorney fees would further the purposes of § 1988, and (2) whether the balance of equities favors or disfavors the denial of fees." *Gilbrook v. City of Westminster*, 177 F.3d 839, 878 (9th Cir. 1999).

In its previous order of January 14, 2002, this court concluded that although allowing attorney fees would further the purposes of section 1988, the balance of equities favored the denial of fees. The court remains persuaded that allowing attorney fees in this case would further the purposes of section 1988. Defendant essentially concedes that an award of fees would serve the section 1988 purpose of deterring lawmakers from enacting unconstitutional legislation in the future. (*See* Def.'s Opp'n at 30). However, plaintiffs have presented a persuasive argument that, in concluding initially that the balance of equities favored the denial of fees, this court may have placed too much weight on the decision of another district court in *Thorsted v. Gregoire*, 841 F. Supp. 1068, 1084 (W.D. Wash. 1994).

The defendant has the burden of showing special circumstances warrant a denial of fees, and the defendant's showing must be a strong one. *Herrington v. County of Sonoma*, 883 F.2d 739, 744 (9th Cir. 1989). As plaintiffs point out, two other courts have declined to adopt the result in *Thorsted*,[1] and the Eleventh Circuit affirmed an award of attorney fees to plaintiff under strikingly similar circumstances to those here. *See Gerling Global v. Nelson*, No. 00-16542-BB (11th Cir. Dec. 7, 2001), aff'g *Gerling Global v. Nelson*, No. 4:99v444-RH (N.D. Fla. Jan. 2, 2001). *Thorsted* is distinguishable because it involved an initiative, rather than an act of the legislature. Upon further reflection, this court is inclined to conclude that

[1] *Morse v. Republican Party of Va.*, 972 F. Supp. 355 (W.D. Va. 1997) and *Kadlick v. Dep't of Mental Health*, 731 N.E.2d 495 (Mass. 2000).

defendant has not met his burden of showing such special circumstances as to justify the disallowance of fees here.

However, for a separate reason, not present at the time of the court's initial order denying attorney fees, the court must nevertheless again deny an award of attorney fees for the plaintiffs.

Section 1988 provides for an award of attorney fees only in certain types of civil rights actions, including actions under 42 U.S.C. § 1983. At the time of the order of January 14, 2002, this court had determined that plaintiffs were prevailing parties on a section 1983 claim because they had prevailed on their Due Process Clause claim. That decision, however, was reversed by the Ninth Circuit. On certiorari, the Supreme Court held in favor of plaintiffs only under the foreign affairs doctrine. The Supreme Court expressly did not consider or decide whether the HVIRA violated the Commerce Clause or the Due Process Clause. *Am. Ins. Ass'n*, 123 S. Ct. at 2385 n.7 ("Because we hold that HVIRA is preempted under the foreign affairs doctrine, we have no reason to address the other questions.").

Section 1983 of Title 42 of the United States Code protects against the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." Under the posture of the case now, unlike when this court issued its previous order denying plaintiffs' motion for award of attorney fees, the court cannot conclude that plaintiffs prevailed on a section 1983 claim. Now, although the court must conclude that plaintiffs prevailed on a claim that the HVIRA was an invalid, unconstitutional statute, the court cannot conclude that plaintiffs prevailed on a claim that the HVIRA deprived them of any right,

privilege, or immunity secured by the Constitution or federal law.

Specifically, the court cannot conclude that the foreign affairs power implicates a right, privilege, or immunity secured by the Constitution or laws of the United States such that it may form the basis of a section 1983 claim. Rather, to the extent that the foreign affairs power is like the Supremacy Clause, it is not a source of federal rights. *Cf. Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 107 (1989) ("[T]he Supremacy Clause, of its own force, does not create federal rights enforceable under § 1983."); *Associated Gen. Contractors v. Smith*, 74 F.3d 926, 931 (9th Cir. 1996) ("[P]reemption of state law under the Supremacy Clause – being grounded not on individual rights but instead on considerations of power – will not support an action under section 1983, and will not, therefore, support a claim for attorneys' fees under section 1988.").

The court has reviewed several treatises on the subject, none of which suggest that the foreign affairs power may be the basis of a section 1983 claim. *See* John C. Jeffries, Jr., et al., *Civil Rights Actions: Enforcing the Constitution* Ch. 1, § 5 (2000); Erwin Chemerinsky, *Federal Jurisdiction* § 8.9 (3d ed. 1999); 1A Martin A. Schwartz and John E. Kirklin, *Section 1983 Litigation: Claims and Defenses* Ch. 3 (3d ed. 1997 & Supp. 2003).

Plaintiffs argue that because the foreign affairs doctrine is predicated on the need for the United States to speak with one voice, that being through the President, their action may be viewed as one for the deprivation of rights secured by Presidential orders, which have the force

of laws of the United States. Even assuming that this action can be so characterized, and assuming further that Presidential orders are "laws" within the meaning of section 1983, it would be too far of a stretch to conclude that the kind of Presidential orders involved here, negotiating relief for Holocaust victims and their heirs, were intended to secure any right, privilege, or immunity guaranteed to the plaintiffs in this case.

Although the Commerce Clause and the Due Process Clause may be bases of section 1983 claims, *Dennis v. Higgins*, 498 U.S. 439 (1991) (Commerce Clause); *Paratt v. Taylor*, 451 U.S. 527 (1981) (Due Process Clause); *Paul v. Davis*, 424 U.S. 693 (1976) (Due Process Clause), plaintiffs ultimately did not prevail on either of those claims.

IT IS THEREFORE ORDERED that plaintiffs' motion for attorney fees be, and the same hereby is, DENIED.

DATED: January 29, 2004

/s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES
DISTRICT JUDGE

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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42 U.S.C. § 1988. Proceedings in vindication of civil rights

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a

judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction

No. 04-15332 (consolidated with No. 04-15455)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN INSURANCE ASSOCIATION, *et al.*,

Plaintiffs-Appellants,

v.

JOHN GARAMENDI, in his capacity as the COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,

Defendant-Appellee

Appeal from the United States District Court
For the Eastern District of California
Honorable William B. Shubb, District Judge
Dist. Ct. Docket Nos. CIV-S-00-0613 WBS JFM,
CIV-S-00-0506 WBS JFM, CIV-S-00-0875 WBS JFM

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* * *

B. Because The Supreme Court Granted Review On The Commerce And Due Process Clause Issues In The Case, The Commissioner Cannot Be Treated As Having Prevailed On Those Issues

While the district court made no mention of *Maher*, the Commissioner did attempt below to distinguish the decision, and we assume he will reprise his argument here. Pointing to this Court's rejection of plaintiffs' Commerce and Due Process Clause claims in *Gerling I* and *II*, the Commissioner invoked the rule that precludes the award of fees to a party who prevails on a non-fee claim but *loses* on all of its section 1983 civil rights claims. See, *e.g.*, *Mateyko*, 924 F.2d at 828 (a plaintiff "who loses on his federal claim and recovers only on a pendent state claim is not a prevailing party under section 1988 and may not be awarded fees"). The Commissioner declared that rule applicable here because he was successful in his Commerce and Due Process Clause arguments before this Court and the Supreme Court did not expressly overturn this Court's holdings on those issues. For several reasons, however, the Commissioner's reliance on this principle, as well as his argument that he should be treated as the party prevailing on the section 1983 claims in this case, is insupportable.

1. a. To begin with, the Commissioner commits a fundamental error when he fails to view the fees issue from the perspective of the court that had the last word on the merits of claims that underlie the request for fees – that is, from the perspective of the Supreme Court. The Commissioner's argument might be correct if the Supreme Court had *denied* certiorari review of the Commerce and

Due Process Clause questions presented by plaintiffs, leaving only the foreign affairs issue to be decided. But that is not what the Court did: to the contrary, it *granted* review on all three issues (see *American Ins. Ass'n v. Garamendi*, 537 U.S. 1100 (2003); *Garamendi*, 123 S. Ct. at 2385 n.7), expressly finding it unnecessary to address the Commerce and Due Process Clauses only because the Justices disposed of the case by holding the HVIRA invalid under the foreign affairs doctrine. See *id.*

The Supreme Court thus had both the fee-generating (Commerce and Due Process Clause) and what we are assuming to be the non-fee (foreign affairs doctrine) claims before it when it decided the merits of plaintiffs' suit – and that is precisely what triggers application of the *Maher* rule. So far as *Maher* is concerned, this Court's intervening ruling on the merits regarding the Commerce Clause and due process claims is wholly immaterial. After all, as Congress, the Supreme Court, and this Court each have explained, the point of the *Maher* rule is to avoid having the question of entitlement to fees affect the decision-making processes of the court that is entertaining the merits of the plaintiff's suit by forcing that court to resolve a constitutional claim unnecessarily. But the Commissioner's approach would place courts in just that situation. In this case, for example, the Supreme Court found it unnecessary to decide plaintiffs' Commerce

* * *

Nos. 00-16163, 00-16164, 00-16165, and 00-16182

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GERLING GLOBAL REINSURANCE
CORP. OF AMERICA, et al.,

Plaintiffs-Appellees,

v.

CLARK KELSO in his capacity as
the COMMISSIONER OF INSURANCE OF
THE STATE OF CALIFORNIA,

Defendant-Appellant.

BRIEF FOR AMICUS CURIAE THE UNITED STATES
OF AMERICA IN SUPPORT OF AFFIRMANCE

ON APPEAL FROM A PRELIMINARY INJUNCTION
ENTERED BY THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF CALI-
FORNIA, THE HONORABLE WILLIAM B. SHUBB

---

* * *

In view of the importance of the Foundation Agreement, we wish to correct some misunderstandings reflected in the brief of the American Insurance Association ("AIA") concerning the undertakings of the U.S. Government and the impact of the procedures established by the Agreement on existing legal remedies available to American citizens

against private corporations. AIA states that "[t]he federal government . . . has committed to give affected insurers legal peace, including against state litigation and regulatory action," AIA Br. 1, and that the Foundation Agreement "imposes a duty on the United States to achieve 'all-embracing and enduring legal peace' for German companies." AIA Br. 2. The United States has committed to various unprecedented undertakings in the Agreement. As discussed, the United States has committed to file a Statement of Interest in private suits against German companies explaining that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims," Foundation Agreement, Art. 2(1), and has committed to "use its best efforts, in a manner it considers appropriate, to achieve the objectives" of the Agreement, Art. 2(2). It has not, however, undertaken a "duty . . . to achieve" legal peace for German companies against state litigation and regulatory action.

Nor does the Foundation Agreement itself preclude individuals from filing suit on their insurance policies in court. *Cf., e.g.*, AIA Br. at 2 (stating that the Agreement "creates on [sic] exclusive remedy and forum"); *id.* at 12 (stating that the Agreement "mandates that insurance claims that come within the scope of . . . ICHEIC 'shall be processed . . . on the basis of such procedures'"). Although the Agreement obligates the German Foundation to process insurance claims against German companies according to ICHEIC procedures, Foundation Agreement, Art. 1(4), it does not mandate

* * *

In the Supreme Court of the United States

No. 02-722

AMERICAN INSURANCE ASSOCIATION, ET AL.,
PETITIONERS

v.

HARRY LOW, INSURANCE COMMISSIONER,
STATE OF CALIFORNIA

No. 02-733

GERLING GLOBAL REINSURANCE CORP. OF AMERICA,
ET AL., PETITIONERS

v.

HARRY W. LOW, INSURANCE COMMISSIONER,
STATE OF CALIFORNIA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The United States has engaged in extensive diplomatic efforts to assure that the Nations and enterprises responsible for the Holocaust provide some measure of

compensation to their victims. In so doing, the United States has

* * *

(I)

IN THE SUPREME COURT OF THE UNITED STATES

No. 02-722

AMERICAN INSURANCE ASSOCIATION, ET AL.,
PETITIONERS

v.

JOHN GARAMENDI, INSURANCE COMMISSIONER,
STATE OF CALIFORNIA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The United States has engaged in extensive diplomatic efforts to assure that the nations and enterprises responsible for the Holocaust provide some measure of justice to their victims. In so doing, the United States has consistently encouraged the use of voluntary, non-adversarial mechanisms for resolving Holocaust victims' claims. California has adopted a different approach. The State has enacted a series of related statutes, including the one challenged here, to provide a separate means of resolving such claims. Such state laws directly interfere with the national

* * *

through coercive regulative and litigation. The United States has concluded that such an approach serves the interests of Holocaust victims and their families throughout the world, including the interests of elderly survivors of the Holocaust in obtaining some measure of justice within their lifetime. The United States also concluded that a non-adversarial approach serves important interests of the Nation in cooperative relations with its European allies.

* * *

(4)

No. 05-272

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In The

Supreme Court of the United States

JOHN GARAMENDI, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,

Petitioner,

v.

GERLING GLOBAL REINSURANCE CORPORATION OF AMERICA, US BRANCH, et al.,

Respondents.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.1, the National Association of Insurance Commissioners ("NAIC") submits this Brief in support of petitioner, John Garamendi, in his capacity as Commissioner of Insurance for the State of California, in respectfully requesting that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action.

INTEREST OF THE NAIC[1]

The NAIC is a non-profit corporation whose membership consists of the principal insurance regulatory officials of the fifty States, the District of Columbia, the territories and insular possessions of the United States. Formed in 1871, it is the nation's oldest association of state government officials. In filing this *amicus curiae* brief, the NAIC seeks to demonstrate its interest in this proceeding and to fulfill the mission of the NAIC, to:

> . . . assist state insurance regulators, individually and collectively, in serving the public interest and achieving the following fundamental insurance

[1] Neither counsel for the parties to this matter authored this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members or its counsel, made a monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this *amicus curiae* brief. Stipulations indicating their consent have been filed with the Clerk of the Court.

> regulatory goals in a responsive, efficient and cost-effective manner, consistent with the wishes of its members:
>
> Protect the public interest;
>
> Promote competitive markets;
>
> Facilitate the fair and equitable treatment of insurance consumers;
>
> Promote the reliability, solvency and financial solidity of insurance institutions; and
>
> Support and improve state regulation of insurance.[2]

The Executive Committee of the NAIC voted to file this *amicus curiae* brief to demonstrate its support of Petitioner John Garamendi, Commissioner of Insurance for the State of California, in this cause. The interest of the NAIC in this matter arises out of the regulatory responsibility vested in each insurance commissioner, director and superintendent to see that all laws respecting insurance companies are executed faithfully and to safeguard the solvency and financial integrity of insurance companies for the benefit of insurance consumers. The commissioners, directors, and superintendents of the various states, the members of the NAIC, are charged with the responsibility of regulating the business of insurance within their jurisdictions pursuant to the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, and State insurance laws.

---

[2] *See* National Association of Insurance Commissioners, NAIC Mission Statement, *available at* http://www.naic.org/index_about.htm (last visited September 19, 2005).

With regard to the McCarran-Ferguson Act, this Court has stated that "[t]he views of the NAIC are particularly significant, because the Act ultimately passed was based in large part on the NAIC bill." *Group Life and Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 221 (1979).

The NAIC agrees with Commissioner Garamendi that the Ninth Circuit's decision in this case imposing attorneys' fees on the California Department of Insurance will "create significant mischief in many other cases"[3] and will adversely impact the ability of NAIC members to effectively regulate the business of insurance. The NAIC agrees with the analysis of the district court in finding that respondents were not entitled to fees because they had not prevailed on either their Commerce Clause or due process claims. The NAIC supports Commissioner Garamendi in respectfully requesting that this Court issue a writ of certiorari in this matter.

SUMMARY OF ARGUMENT

The Ninth Circuit held in this case that respondents were entitled to an award of attorneys' fees under 42 U.S.C. § 1988 in spite of the fact that respondents did not prevail on the merits on any claim governed by 42 U.S.C. § 1983. This ruling greatly expands potential liability for attorneys' fees for all entities potentially liable under Section 1983, including the state insurance regulatory authorities that are the members of the NAIC. This expansion of potential liability will chill important state regulatory activities as regulators will face the prospect of

[3] Petition for Writ of Certiorari at p. 9.

paying attorneys' fees to plaintiffs who may prevail against them in litigation on non fee-bearing constitutional and state law grounds even where the court rules that the regulatory conduct at issue does not amount to a Section 1983 violation. Further, it will encourage the addition of meritless Section 1983 claims to any action against a state official and will discourage defendant regulators from appealing adverse state law rulings in cases where plaintiff did not prevail on attached Section 1983 claims. Taken together, these results present a very real threat to the ability of state regulatory officials to supervise the businesses they are charged with regulating and to act in the interests of the consumers they are charged with protecting.

ARGUMENT

Respondents in this case challenged the constitutionality of California's Holocaust Victim Insurance Relief Act, Cal. Ins. Code §§ 13800-13807 (the "HVIRA") on a variety of grounds. This Court ultimately held that the HVIRA was preempted because it conflicted with federal initiatives concerning Holocaust related insurance claims undertaken pursuant to the foreign policy powers granted to the federal executive branch. *American Insurance Ass'n, et al. v. Garamendi*, 539 U.S. 396, 401 (2003) (*Garamendi*). Respondents' Section 1983 claims, those claiming that the HVIRA violated the Commerce Clause and due process, were rejected by the Ninth Circuit in its two rulings on the merits of this case. *Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739 (9th Cir. 2001) ("*Gerling I*") (rejecting respondents' Commerce Clause claims) and *Gerling Global Reinsurance Corp. of Am. v. Low*, 296 F.3d

832 (9th Cir. 2002) ("*Gerling II*") (ruling that the HVIRA does not violate due process). This Court did not address the due process and Commerce Clause claims. *Garamendi*, 539 U.S. at 413 n. 7.

Following this Court's decision on the foreign affairs preemption claim, respondents moved for attorneys' fees pursuant to Section 1988.[4] The district court found that respondents were not entitled to fees because they had not prevailed on either their Commerce Clause or due process claims. The Ninth Circuit reversed, holding that respondents were entitled to fees even though it recognized that they had not prevailed on any fee-bearing claim. *Gerling Global Reinsurance Corp. of Am. v. Garamendi*, 400 F.3d 803 (9th Cir. 2005), rehearing denied, as amended, 410 F.3d 531 (9th Cir. 2005) ("*Gerling III*").

The NAIC agrees with Petitioner Commissioner Garamendi that the Ninth Circuit's decision in this case represents an unwarranted departure from precedent on the issue of entitlement to attorneys' fees under Section 1988. Section 1988 makes it a prerequisite for the award of attorneys' fees that the party seeking fees be the "prevailing party". This Court has previously recognized that victory in the case does not alone satisfy that necessary predicate; the plaintiff must be entitled to relief under Section 1983. *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 592 (1995). *Maher v. Gagne*, 448 U.S. 122 (1980) created a limited exception to the "prevailing

[4] Respondents first moved for attorneys' fees after the initial summary judgment ruling and that motion was denied by the district court. The Ninth Circuit then rejected all of respondents' claims on the merits and ruled that they were not entitled to fees because they were not prevailing parties. *Gerling II*, 296 F.3d at 851.

party" rule in cases where a plaintiff's substantial 1983 claims were never reached for prudential reasons. The *Maher* rule is inapplicable where, as here, the 1983 claims were litigated and plaintiff lost.

The members of the NAIC, in their capacity as the chief insurance regulators of their respective states, may be subject to suits for injunctive relief under Section 1983 for any official act, be it the enactment of a regulation or administrative practice, or the application of an existing statute, regulation or administrative practice to an insurer doing business in their state. The Ninth Circuit's ruling in this case, which makes it possible for plaintiffs to be awarded attorneys' fees in Section 1983 cases even after losing on those claims, increases the expense and expands the risk associated with Section 1983 litigation. The likely result of this expanded availability of fees is that any plaintiff who brings a lawsuit on state law or non-fee bearing constitutional grounds will append a Section 1983 claim so that they may be awarded fees even if they do not prevail on that claim. Further, a defendant regulator who prevails on a Section 1983 claim may be reluctant to appeal an adverse ruling on a state law or non-fee bearing claim for fear that fees will be awarded if plaintiff cross-appeals the Section 1983 claims. Application of the Ninth Circuit's ruling in that scenario could result in an award of attorneys' fees even if the reviewing court never reaches the Section 1983 claims, as in the present case.

More troubling than the impact on litigation is the potential chilling effect the Ninth Circuit's ruling has on the regulatory activities of state insurance departments and other entities potentially liable under Section 1983. Certainly all state insurance commissioners, directors and superintendents are well aware that their actions must be

within constitutional parameters. Under *Gerling III*, however, these officials have to be concerned not only that they succeed in any constitutional challenges, but also that they are not challenged through litigation in the first place. State regulators now face a new risk from litigation, being required to pay attorneys' fees under *Gerling III*, even where a court rules for the regulators and finds that their actions did not violate Section 1983.

The energies and resources of state insurance regulators are focused on protecting insurance consumers in their state and insuring the financial solvency of insurers doing business in their state. Regulators should not be stymied in their efforts towards achieving these goals by the fear of large awards of attorneys' fees if those efforts are challenged and decided on non-fee bearing grounds.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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